IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-661

UNITED STATES OF AMERICA,
Petitioner,

v.

GABRIEL FRANCIS ANTELOPE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS WILLIAM ANDREW DAVISON AND LEONARD FRANCIS DAVISON

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QUESTIONS PRESENTED

1. Whether, in legislating with regard to criminal offenses committed within Indian Country, Congress has violated Indians' constitutional rights to equal protection by legislating laws which subject them to harsher criminal standards based solely on their racial classification when no compelling governmental interest exists.

2. Whether, 18 U.S.C. 1153 is so vague on its face and in its application that it lacks constitutional certainty as to whom the statute will bring under its provisions for criminal jurisdiction.

3. Whether, if the first question is answered in the affirmative, the Court should invalidate those portions of 18 U.S.C. 1152 and 1153 which define and punish offenses committed in Indian Country more harshly than the laws of the State in which the offenses are committed thereby adopting 18 U.S.C. 7 and 13 for substantive definitions of crimes committed within Indian Country.

STATEMENT OF THE CASE

Petitioner's Brief sets forth the facts pertinent to the case now before the Court. (Pet. Brief 5-8). At page 6 of Petitioners' Brief it is concluded that the evidence was sufficient to submit to the jury a charge of premeditated murder. The testimony from the only eye witness, Norbert Seyler, raises questions as to causation. (See A. 6-9). Seyler's testimony points to the conclusion that the deceased was dead before William Davison made physical contact with the deceased. Seyler's testimony did not conclude that Leonard Davison's conduct resulted in the deceased's death. (See A. 6-9). Thus, Respondents, Leonard Davison and William Davison, submit that without the Felony Murder Provision contained within the applicable Federal Statutes (18 U.S.C. 1153 and 1111) the Government would not have been able to sustain the charges contained within Count III of the indictment, murder. (A. 4-5).

The question as to causation was raised on appeal as to Respondent William Davison. The Court of Appeals concluded that since the constitutional issue was dispositive of the case there was no need to consider the causation issue. (Pet. App. 15a). Should this Court reverse the Court of Appeals' decision, the causation issue would then become viable as to Respondent William Davison.

In all other respects, Respondents Leonard Davison and William Davison have no disagreement with Petitioners' Statement. (Pet. Brief 5-8).

SUMMARY OF ARGUMENT

I.

Respondents, Leonard Davison and William Davison, were discriminated against by reason of their Indian race when charged with first degree murder in Count III of the indictment pursuant to 18 U.S.C. §1153 and §1111. Under those federal statutory provisions the Government's burden of proof was lessened by the felony murder provision contained within 18 U.S.C. §1111. If the Respondents had been non-Indian under the jurisdiction provisions contained within 18 U.S.C. §1152 and §1153 they would have been subject to Idaho jurisdiction and the Idaho homicide statute, I.C.A. §18-4003, which does not contain the felony murder doctrine. Due to Respondents' race the Government was not required to prove the mens rea element of premeditation and deliberation which made the prosecution of Respondents less burdensome than it would otherwise have been had they been non-Indian.

A. Crimes committed within Indian Country are subject to three possible forums; federal, state, and tribal, depending upon the nature of the offense, the race of the victim and the race of the defendant.

Crimes committed within Indian Country which are contained within the Major Crimes Act, 18 U.S.C. §1153, are divided into four possible jurisdictional categories depending upon the race of the victim and the race of the defendant. A defendant charged with violation of one of the crimes enumerated in the Major Crimes Act will be faced with either state court or federal court jurisdiction. The two jurisdictions oftentimes define the same criminal offense in a different manner. This often results, as it did here, in a defendant, due to his race, being compelled to defend himself against a harsher standard.

When a defendant is charged with committing a crime within Indian Country which is not contained within the Major Crimes Act, 18 U.S.C. §1153, the forum having jurisdiction will be either federal court, state court, or tribal court, depending upon the race of the defendant and the race of the victim. Here again, disparities exist between the standards which the defendant must defend himself. The disparities in the standards are based solely upon racial classifications.

This situation becomes further perplexed by virtue of 18 U.S.C. §1162, commonly known as Public Law 280. Six states are affected by Public Law 280. In those states all crimes committed within the enumerated Indian reservations are subject to state court jurisdiction entirely without regard to the race of the defendant or the race of the victim. The enactment of 18 U.S.C. §1162 indicates Congressional recognition that the Federal Government's trust responsibility towards

Indians is not necessarily furthered by requiring absolute federal court jurisdiction when criminal offenses are committed within Indian Country where an Indian is involved as either a perpetrator or a victim.

The statutory framework pertaining to crimes committed within Indian country creates prejudicial disparities based solely upon racial classifications which are contrary to the due process and equal protection provisions of the Constitution.

B. The term, Indian, contained within 18 U.S.C. §1153 is a racial classification. Only people who have the requisite percentage of Indian blood come within the purview of the criminal jurisdiction of the Federal Government under 18 U.S.C. §1153. The recent case of *Morton v. Mancari*, 417 U.S. 535, allowed the Bureau of Indian Affairs' employment preference of Indian applicants over non-Indian applicants for the reason that the Federal Government had a political-social relationship with the Indians which justified such a preference. The holding of the *Mancari Case* is limited to that proposition only and does not countenance the discrimination which exists here.

C. The racial classifications of 18 U.S.C. §1152 and §1153 result in invidious discrimination without furthering a compelling governmental interest. The plenary power of Congress over Indians and the Government's trust responsibility for Indians do not furnish a compelling federal interest to justify this racial classification. In fact the racial classifications existing here have frustrated the Government's trust responsibility toward Indians by conferring a hardship based solely upon their race.

II.

The term Indian contained within 18 U.S.C. §1153 is unconstitutionally vague. This allows administrative discretion in determining who comes within the definition of the term "Indian" for purposes of selective prosecution. The term "Indian" is not defined within Chapter 53 of Title 18 of the United States Code. This failure has caused problems of certainty in determining which people fall within this classification for purposes of criminal jurisdiction. The vagueness created by the definition of the term "Indian" renders the statute unconstitutional.

III.

If the Court agrees with the Court of Appeals that unconstitutional results occur when provisions of 18 U.S.C. §1152 and §1153 treat Indian defendants harsher than similarly situated non-Indian defendants are treated the Court should consider a construction which will lead to constitutional results. 18 U.S.C. §1152 and §1153 can be construed together with 18 U.S.C. §7 and §13 to cover criminal offenses committed within Indian Country without creating racial disparity in the treatment of potential defendants.

This result can be achieved by invalidating those portions of 18 U.S.C. §1152 and §1153 which define and punish offenses committed within Indian Country more harshly than the laws of the state in which the offenses are committed and thereby allow the Assimilated Crimes Act, 18 U.S.C. §7 and §13, to control the substantive definition of crimes.

Should the Court elect to construe the statutes to allow for this result Congress would still maintain the right to legislate for criminal offenses committed within Indian Country. Such a result would not violate the trust responsibility that the Federal Government has toward Indians; in fact, it would further that responsibility by remedying the discriminatory results which have occurred here.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I.

RESPONDENTS WERE DENIED EQUAL PROTECTION OF THE LAWS.

Respondents were discriminated against by reason of their Indian race in that the Government's burden of proof under 18 U.S.C. §1153 and §1111 were lessened by the Felony Murder Provisions contained therein. Given the Federal Statutory Provisions of 18 U.S.C. 1152 and 1153 if the Respondents had been non-Indian they would have been subject only to Idaho jurisdiction. The Homicide Statute in the State of Idaho, I.C.A. §18-4003, does not contain the Felony-Murder Doctrine, thus, due to Respondents' race, the Government was not required to prove the mens rea element of premeditation and deliberation which made prosecution of Respondents less burdensome than had Respondents been non-Indian subject only to Idaho jurisdiction.

A. The Existing Allocation Of Federal And State Jurisdiction Over Offenses Committed Within Indian Country Is Constitutionally Invalid.

Crimes committed within Indian Country are subject to three possible forums; Federal, State, and Tribal, depending upon the nature of the offense, the race of the victim and the race of the defendant.

Crimes defined under 18 U.S.C. 1153, the Major Crimes Act, are subject to either Federal Court of State Court, depending upon the race of the defendant and the race of the victim. These crimes fit into four categories for jurisdictional purposes. The crime of murder is one of the thirteen major crimes enumerated in 18 U.S.C. 1153. The four possible jurisdictional categories for the offense of murder committed within Indian Country are as follows:

(1) The crime of killing an Indian by an Indian is governed by the Major Crimes Act, 18 U.S.C. §1153. Murder under that section is defined in 18 U.S.C. §1111, which includes the felony murder definition.

(2) The crime of killing of an Indian by a non-Indian is governed by the Federal Enclave Law, 18 U.S.C. §1152, which also refers to §1111 for the definition of murder.

(3) The crime of killing a non-Indian by an Indian is controlled by §1153, as defined in §1111. This is the situation in the case before the court.

(4) The killing of a non-Indian by a non-Indian in Indian country is a matter for prosecution by the state in which the offense occurred. *New York ex rel. Ray v. Martin*, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946); *United States v. McBratney*, 104 U.S. (14 Otto) 621, 26 L.Ed. 869 (1881); *United States v. Cleveland*, 503 F.2d 1067 (CA 9 1974). The definition of murder in such a case is

determined by reference to the situs state's law. In the State of Idaho, the homicide statute does not contain the felony murder definition. (I.C.A. §18-4003).

Crimes committed within "Indian Country" not contained within the Major Crimes Act (18 U.S.C. 1153) are subject to three possible forums depending upon the race of the defendant and the race of the victim. The four possible jurisdictional categories follow:

(1) Crimes involving Indian victims and Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to the Tribal Court. 18 U.S.C. 1152; *Acuina v. United States* 404 F.2d 140 (1968).

(2) Crimes involving Indian victims and non-Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to Federal jurisdiction by virtue of the Assimilated Crimes Act (18 U.S.C. 7 and 13[1]; 18 U.S.C. 1152).

(3) Crimes involving non-Indian victims and Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to Federal Jurisdiction. (18 U.S.C. 1152; 18 U.S.C. 13; *United States v. Burland* 441 F.2d 1199).

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[1] 18 U.S.C. §§7 and 13 provide:

§7. SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES DEFINED

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within

(continued)

(4) Crimes involving non-Indian victims and non-Indian defendants outside of the Major Crimes Act (18 U.S.C. 1153) are subject to State court jurisdiction. (18 U.S.C. 1152; *New York ex rel.*

(footnote continued from preceding page)
the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.
(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

§13. LAWS OF STATES ADOPTED FOR AREAS WITHIN FEDERAL JURISDICTION

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Ray v. Martin 326 U.S. 496 (1946); *United States v. McBratney*, 104 U.S. (14 Otto) 621; *United States v. Cleveland* 503 F.2d 1067 (CA9 1974); *State v. Jones* 546 P.2d 235 (1976 Nevada).

In addition to the jurisdictional categories listed above there are six states which have total jurisdiction over all crimes committed within their state including the Indian Territory within their borders are defined within 18 U.S.C. 1162, commonly known as P.L. 280[2]. This jurisdiction is invoked without regard to the nature of the offense, the race of the victim or the race of the defendant. In these states, the provisions of 18 U.S.C. 1152 and 1153 do not apply.

[2] 18 U.S.C. §1162 provides:

1162. STATE JURISDICTION OVER OFFENSES COMMITTED BY OR AGAINST INDIANS IN THE INDIAN COUNTRY.–(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.

STATE OR TERRITORY OF	INDIAN COUNTRY AFFECTED
Alaska	All Indian country within the Territory (State)
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation

(continued)

The question presented is whether Congress has violated Respondents' constitutional rights to equal protection by legislating laws which frequently subject Indians to harsher criminal standards based solely upon their racial classification when no compelling Governmental interest exists.

Petitioner argues that the division of responsibility for crimes committed within Indian Country is validly divided between the Federal and State jurisdictions. Petitioner argues that where Indians are involved the federal trust responsibility justifies federal jurisdiction. Where non-Indians are involved it is argued that no federal interest or trust is involved and the matter then becomes solely of state concern. (Pet. Brief 24-25).

Petitioners' argument fails when one considers 18 U.S.C. 1162, commonly known as P.L. 280. If in fact Congress has a federal trust responsibility to Indians which justifies differences in state and federal jurisdiction depending upon whether an Indian is involved

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(footnote continued from preceding page)

Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shal (sic) not be applicable within the areas of Indian country listed in subsection (a) of this section.

either as a victim or perpetrator it was not recognized by Congress in legislating 18 U.S.C. 1162.

As previously stated, 18 U.S.C. 1162 confers absolute jurisdiction to six states for all offenses committed within the respective state's enumerated Indian reservations without regard to whether an Indian is a perpetrator or victim. Defendants in other states accused of committing crimes on Indian reservations are subject to the statutory scrutiny previously set forth which depends upon the nature of the offense, the race of the victim and the race of the defendant. This statutory framework creates prejudicial disparities based upon racial classification contrary to the due process and equal protection provisions of the constitution.

The petitioner's federal guardianship interest argument summarized at pages 24 and 25 of Petitioner's Brief fails in view of 18 U.S.C. 1162.

Indians accused of crimes within Indian reservations located within the six states enumerated in 18 U.S.C. 1162 are subject to state law definitions while Indians living on reservations in other states are subject to the federal law definitions when accused of crimes enumerated in 18 U.S.C. 1153. Even here, some crimes contained within 18 U.S.C. 1153 are relegated to the states' substantive definition.

B. Federal Legislation Concerning Crimes Committed "Within Indian Country" Is Based Upon An Impermissible Racial Classification.

The essential question presented by this case is whether criminal jurisdiction over Indians is acquired through a statute based on racial classification. The statute rendering jurisdiction over Indians in criminal

matters uses racial language on its face. "*Any Indian* who commits against the person or property of another *Indian* . . ." (18 U.S.C. 1153) (Emphasis supplied.)

Although the statute does define the other requirement for criminal jurisdiction, i.e. Indian Country, (18 U.S.C. 1151) it does not define the term, Indian. The earliest definition of that term by this Court was in *United States v. Rogers*, 45 U.S. 567 (1846). There the defendant, a white man lived on the Cherokee reservation for nearly ten years, married an Indian, became adopted by the tribe under proper authority and exercised all rights and privileges of a Cherokee Indian. The Court refused to define him as an Indian for purposes of criminal jurisdiction.

> ". . . we think it very clear, that *a white man* who at a mature age is *adopted in an Indian tribe does not thereby become an Indian*. . . . He may by such adoption become entitled to certain privileges in the tribe. . . . Yet *he is not an Indian;* and the exception is confined to those who by the usages and customs of the Indians are regarded as *belonging to their race*. It does not speak of members of a tribe; but of the race generally,—of the family of Indians. . . * * * Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, ... He *was still a white man, of the white race*. . . ." *United States v. Rogers, supra,* at 572-573. (Emphasis added.)

In a later case this Court refused to allow a Black to be adopted into an Indian tribe for criminal jurisdiction purposes.

> "Although the prisoner, Alberty, was not a native Indian, but a negro born in slavery, *it was not disputed that he became a citizen of the Cherokee nation*. . . * * * While this article of the treaty gave him the rights of a native Cherokee, *it did not . . . make him an Indian,* within the meaning of Rev. St. Section 2146. . . ." *Alberty v. United States,* 162 U.S. 499, 500, 501 (1896). (Emphasis supplied.)

In still a later case, this Court was faced with how to determine which persons would fall into the guardianship category for protection. It continued the racial definition for the term, Indian. "Congress has recognized that un-enrolled Creeks of the *half-blood or more are tribal Indians* subject to federal control." *Board of Commissioners v. Seber,* 318 U.S. 705, 718 (1942). (Emphasis supplied.)

The Association on American Indian Affairs' book, *Federal Indian Law,* (1966) at 8, which is a manual used by the Interior Department and its office for Indian Affairs has insisted on the requisite of Indian blood.

> "Within the meaning of those various statutes which though applicable to Indians do not define them, the courts, in defining the status of Indians of mixed Indian and other blood, have largely followed the test laid down in *United States v. Rogers,* to the effect that *an individual to be considered an Indian must* not only *have some degree of Indian blood* but must in addition be recognized as an Indian." (Emphasis supplied.)

In *State v. Atteberry,* 110 Ariz. 354, 519 P.2d 53, 54 (1974) to determine whether the defendant came within the purview of 18 U.S.C. 1153 as an Indian, the Arizona Supreme Court held:

> ". . . the test of Indian status has depended on two things (a) a substantial percentage of Indian blood, and (b) recognition as an Indian."

In *United States v. Ives,*[3] 504 F.2d 935 (1974) the defendant was convicted of murdering a non-Indian on an Indian reservation thereby coming under 18 U.S.C. 1153. He was identified as an Indian, even though he had voluntarily and on his own initiative tried to have his name removed from the tribal rolls a considerable time before the commission of the homicide. The court held nevertheless, that: "...enrollment or lack of enrollment is not determinative of Ives' status as an Indian." *United States v. Ives, supra,* at 953.

In *In Re Carmen's Petition,* 165 F. Supp. 942 (1958) aff'd per curiam sub nom; *Dickson v. Carmen,* 270 F.2d 809 (1959) cert. denied, the defendant had been convicted for the murder of an Indian within Indian Country, bringing into play 18 U.S.C. 1153 and 18 U.S.C. 1111. The court refused to accept the negation of tribal relations as bearing on the status of the defendant being an Indian.

> "Respondent also questions the applicability of the Major Crimes Act on the grounds that petitioner although an Indian by blood, is emancipated to such extent that he is not an Indian within the meaning of the Act. None of the decisions relied upon by respondent support this contention." *In Re Carmen's Petition, supra,* at 946.

The court did not consider whether an Indian can be emancipated so as to escape the Act. Instead, it cited *Davis v. United States,* 32 F.2d 860 (1929) as standing: "For the proposition that tribal relations have no bearing on an Indian's status as an Indian within the

[3] *United States v. Ives* was granted certiorari (421 U.S. 944), the judgment was vacated and remanded for consideration of the phychiatric examination issue of defendant's competency to stand trial as explained by the court in *Drope v. Missouri,* 95 S. Ct. 896.

meaning of the Ten Major Crimes Act." *In Re Carmen's Petition, supra,* 947.

There can be little question that 18 U.S.C. 1153 is a racial classification in using the term, "Indian." Tribal enrollment is not used by all courts to determine if the accused is either in or out of the so-called "social-political group" and tribal enrollment is most certainly not determinative of his racial status as an Indian. It should be pointed out that determination of who is enrolled on the tribal rolls is within the discretion of the Department of the Interior and its offices. The guidelines for such enrollment by those officers are also on a quantum of blood analysis.

> "The Indian tribes have orginal power to determine their own membership. Congress has the power, however, to supersede that determination... * * * Congress may authorize an administrative body to make a roll descriptive of the persons thereon so that they might be identified... * * * Congress may disregard the existing membership rolls of a tribe and direct that the per capita distribution be made upon the basis of a new roll, even though such act may be inconsistent with prior legislation, treaties, or agreements with the tribe. (See also 25 U.S.C. 163) Cohen's *Handbook on Federal Indian Law, supra,* at 98-99.

At pages 33-36 of Petitioner's Brief it is argued that the statutes in question do not rest upon impermissible racial classification but are based upon a political-social relationship which the Federal Government has assumed.

In support of this contention Petitioner relies upon the recent case of *Morton v. Mancari,* 417 U.S. 535. *Mancari,* supra, is distinguishable in that the matter before the Court was civil in nature and further worked to the benefit of the Indians. Here, the proceedings are

criminal in nature and impose a detriment upon the Respondents.

The Court in *Mancari*, supra, at page 554, limited its holding to preferring Indians in Bureau of Indian Affairs' employment only:

> "... Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Governmental agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. ..."

It is for the above described reasons that the court of appeals in the case at the bar stated: "We here emphasize that the *sole* basis for the disparate treatment of appellants and non-Indians is that of race." (Pet. App. 6a) It is because of this racial classification that criminal jurisdiction exists (18 U.S.C. 1153).

C. The Racial Classifications Contained Within 18 U.S.C. §§1152 And 1153 Result In Invidious Discrimination Without Furthering A Compelling Governmental Interest.

Although the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is violative of due process. *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Johnson v. Robison*, 415 U.S. 361 (1973); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The Court in *Bolling v. Sharpe*, *supra*, held that the Fifth Amendment applies to the **federal** government much like the Fourteenth Amendment does to the states.

> "Classification based solely upon race must be scrutinized with particular care, since they are contrary to our traditions, and hence constitutionally suspect. As long ago as 1896, this Court declared the principal, 'that the Constitution of the United States, in its present form, forbids ... discrimination by the General Government, or by the States, against any citizen because of his race.' " *Bolling v. Sharpe*, *supra*, at page 499.

When a racial classification is seen as being unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, it will also be seen as unconstitutional under the due process requirement of the Fifth Amendment. To allow a racial classification statute to stand, the government must show some *compelling interest* in the classification.

This Court in *Hunter v. Erickson*, 393 U.S. 385, 392 (1969), explained that:

> "... racial classifications are constitutionally suspect and subject to the most rigid scrutiny. They bear a far heavier burden of justification than other classifications."

This Court has noted that the "traditional indicia of suspectness" are: (1) a class determined by characteristics which are solely an accident of birth; or (2) a class subjected to such a history of purposefully unequal treatment of relegated to a position of such political powerlessness, as to command extraordinary protection from the majority. *Johnson v. Robison*, 415 U.S. 361 (1973). The present classification fits both categories: the class is determined by accident of birth, and the class has been subjected to a history of unequal treatment resulting in political powerlessness.

Justice Harlan in *Hunter v. Erickson*, *supra*, at 393, described what might be necessary to sustain the

required heavy burden of justification. "Like any other statute which is discriminatory on its face, such a law cannot be permitted to stand unless it can be supported by state interests of the most weighty and substantial kind."

Justice Steward in *McLaughlin v. Florida*, 379, U.S. 184, 198 (1964), explained:

> "It is simply not possible for a state law [or in this case a federal law] to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor."

Although the criminality of the act per se is not based on race; i.e., 18 U.S.C. 1111 is not racial in classification. The jurisdictional power which brings the defendant under 18 U.S.C. 1111 is based on race, thereby creating an identical result as in *McLaughlin, supra.*

Appellants argue that the compelling federal interest for this racial classification is two-fold: (1) the plenary power of Congress over Indians, and (2) the government's trust responsibility for Indians.

Congress has plenary power over Indians and a wide-scope of authority over their affairs. However, Congress in exercising power over Indian affairs is subject to the limitations contained in the Bill of Rights. In 1938 this Court, after noting the plenary power of Congress in this area added:

> "It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to Constitutional limitations. . . ." *United States v. Klamath & Moada Tribes of Indians*, 304 U.S. 119, 123 (1938).

The trust responsibility must remain subject to constitutional limitations in recognition of Indians' inherent rights as citizens of the United States. This Court confirmed that position in *Keeble v. United States*, 412 U.S. 205, 211, 212 (1973).

> "In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would 'be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of others.' 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). *This is emphatically not to say*, however, *that Congress intended* to deprive Indian defendants of procedural rights guaranteed to other defendants, or *to make it easier to convict an Indian than any other defendant.*" (Emphasis supplied.)

It was this same reasoning that the Federal District Court of New Mexico in *United States v. Boone*, 347 F. Supp. 1031 (1972), applied in holding 18 U.S.C. 1152 to be a denial of equal protection: ". . . the defendant is subject to conviction upon a lesser burden of proof. . . ."

The Court went on to find:

> "In the case at bar, the racial differentiation in section 1153 results in disadvantages to the defendant and it is difficult to see any benefit to Indians generally. The racial classification is not reasonably related to any proper governmental objectives and is therefore arbitrary and invidious in violation of the due process clause of the Fifth Amendment." *United States v. Boone, supra*, at 1035.

The Eighth Circuit in *United States v. Big Crow*, 523 F.2d 955, 959 (1975) cert. denied, explained the wardship doctrine in this manner:

"While the Supreme Court has approved legislation singling out Indians for special treatment, such special treatment must at least be 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . .' It is difficult for us to understand how the subjection of Indians to a sentence ten times greater than that of non-Indians is reasonably related to their protection. We further question whether the rational basis test is the appropriate standard where racial classifications are used to impose burdens on a minority group rather than, as in *Morton v. Marcari*, 417 U.S. 535 (1974), to help the group overcome traditional legal and economic obstacles. It is the generally settled rule that the government bears the burden of showing a compelling interest necessitating racially discriminatory treatment. * * * Under the circumstances, we are constrained to hold that 18 U.S.C. 1153 can not constitutionally be applied so as to subject an Indian to a greater sentence than a non-Indian could receive for the same offense."

In *United States v. Cleveland*, 503 F.2d 1067, 1071 (1974), the Ninth Circuit in an 18 U.S.C. 1153 case held that:

"The sole distinction between the defendants who are subjected to state law and those to whom federal law applies is the race of the defendant. No federal or state interest justifying the distinction has been suggested, and we can supply none."

There has been no disagreement among the various appellate federal decisions as to the issue of racial classification in 18 U.S.C. 1153, *United States v. Cleveland, supra; United States v. Analla*, 490 F.2d 1204 (1974); *United States v. Boone, supra; Henry v. United States*, 432 F. Supp. 1031; *Gray v. United States*, 394 F.2d 96 (1967); *Kills Crow v. United States, supra; United States v. Maestas*, 523 F.2d 316

(1975); *United States v. Big Crow*, 523 F.2d 955 (1975).

This Court in *McLaughlin v. Florida, supra*, at 192, held that where the statute uses racial classification it is suspect and must meet the compelling interest test, and, "Without such justification the racial classification . . . is reduced to an invidious discrimination."

Petitioners no where suggest that a compelling government interest exists for the racial classification which exists here.

Petitioners do argue at pages 33-36 of their Brief that the differences in jurisdiction furthered by the statutes in question are an important exercise of the federal trust responsibility for Indian tribes. Assuming this to be true, the racial discrimination which results does not foster a compelling governmental interest.

Further, it is certainly questionable whether Congress now recognizes a trust responsibility for Indians which can be furthered only by conferring jurisdiction to federal courts where Indians are involved as either perpetrators or victims when crimes are committed within Indian Reservations in view of 18 U.S.C. 1162.

Here, the situation which arose worked a detriment to the Respondents solely due to their race, contrary to the Federal Government's wardship and trust responsibility which Petitioner argues.

There being no compelling governmental interest to justify the racial classification which exists here, 18 U.S.C. 1153 must be found invidiously discriminatory and therefore unconstitutional as a denial of Respondent's Equal Protection and Due Process guarantees.

II.

THE TERM "INDIAN" CONTAINED WITHIN 18 U.S.C. 1153 IS UNCONSTITUTIONALLY VAGUE THUS ALLOWING ADMINISTRATIVE DISCRETION IN DETERMINING WHO COMES WITHIN THAT DEFINITION FOR PURPOSES OF PROSECUTION.

The court of appeals disapproved of allowing the government to circumvent discriminatory laws by accomplishing through discriminatory jurisdiction what it could not do through discriminatory statutory coverage.

> "The government should not be permitted to accomplish through discriminatory jurisdiction what it cannot do through discriminatory statutory coverage. . . . To hold otherwise would allow the government to run roughshod over the Fifth Amendment in the name of jurisdictional sacrosanctity, employing jurisdiction as an inviolate tool." (Pet. App. 12a).

There is nowhere within Chapter 53 of Title 18 of the United States Code a definition of the term, "Indian".

The failure by the Congress to define the term "Indian" causes constitutional problems of certainty.

Justice Douglas in *United States v. Cardiff,* 344 U.S. 174 (1952) explained the vice of vagueness as it related to the lack of identification of the person to whom a criminal statute, or in this case criminal jurisdiction, would apply:

> "The vice of *vagueness* in criminal statutes is the treachery they conceal either *in determining what persons are included* or what acts are prohibited.

> Words which are vague and fluid may be as much of a trap for the innocent as the ancient laws of Caligula." (Emphasis added.)

Not only must criminal activity be defined with definiteness and certainty, but criminal jurisdiction must inevitably fit the same standard. The underlying principle is that people are entitled to be informed not only as to what the state or federal government forbids, but also as to whom the law applies.

18 U.S.C. 1153 allows the prosecutor to identify the perpetrators as Indians or non-Indians at his will and prosecute under the easier statute.

An Indian can not always remove his name from the tribal membership rolls to emancipate himself from a tribe. *United States v. Ives,* 504 F.2d 935 (1974). He may still be regarded as an Indian because of his physical racial characteristics.

This lack of identification of who is an Indian, leaves prohibitive discretion with the administrators of the laws in violation of due process as required under the Fifth Amendment. It renders 18 U.S.C. 1153 unconstitutionally vague.

In *Niemotko v. Maryland,* 340 U.S. 268, 285 (1951), this Court said:

> "The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appears not arbitrary does not save the validity of the authority under which the action was taken."

The vagueness of the definition of the term, "Indian" in 18 U.S.C. 1153 fits both categories used by this Court in the past to cause it to be rendered unconstitutional: (1) It does not give sufficient notice to citizens of the United States, and (2) It allows

overbroad administrative discretion. It is impossible to always be certain who will be classified as an Indian and who will not; therefore, 18 U.S.C. 1153 must be found unconstitutional.

III.

THE COURT SHOULD INVALIDATE THOSE PORTIONS OF 18 U.S.C. §1152 AND §1153 WHICH DEFINE AND PUNISH CRIMINAL OFFENSE COMMITTED WITHIN INDIAN COUNTRY MORE HARSHLY THAN THE LAWS OF THE STATES IN WHICH THE OFFENSES ARE COMMITTED AND THEREBY ADOPT THE ASSIMILATED CRIMES ACT, 18 U.S.C. §7 AND §13 FOR SUBSTANTIVE DEFINITION OF CRIMES.

For the reasons enumerated above 18U.S.C. §1152 and §1153 are unconstitutional as applied due to the detrimental discriminatory treatment resulting to Respondents. If the Court agrees with the court of appeals that unconstitutional results occur when provisions of 18 U.S.C. §1152 and §1153 treat Indian defendants harsher than State law would treat similarly situated defendants, the Court should consider a construction which would lead to constitutional results.

It is submitted by Respondents that 18 U.S.C. §1152 and §1153 can be construed together with 18 U.S.C. §7 and §13 to cover criminal offenses committed within Indian Country without creating racial disparity in the treatment of potential defendants.

This constitutional result can be reached by invalidating those portions of 18 U.S.C. §1152 and §1153

which define and punish offenses committed within Indian Country more harshly than the laws of the State in which the offenses are committed and thereby allow the Assimilated Crimes Act, 18 U.S.C. §7 and §13, to control the substantive definition of the crimes. By so doing the Court would remove the racially discriminatory treatment which currently exists.

The last two paragraphs of 18 U.S.C. §1153 provide for the relegation of the substantive definition of some of the Major Crime Act offenses to State law. Thus, in these situations there is no disparity in treatment as to potential defendants. It is where the substantive definition of crimes contained within the Federal Code; i.e., 18 U.S.C. §1111, conflicts with State definitions; i.e., I.C.A. §18-4003, that discriminatory results occur. When these situations arise the federal definition should be invalidated and the State definition containing the more lenient standard should be adopted through the use of the Assimilated Crimes Act, 18 U.S.C. §7 and §13.

The first paragraph of 18 U.S.C. §1152 extends the general laws of the United States to Indian Country.

The second paragraph of 18 U.S.C. §1152 excludes the situation where an Indian is a defendant. By invalidating the second paragraph of 18 U.S.C. §1152 the provisions of the Assimilated Crimes Act, 18 U.S.C. §7 and §13, would become available for substantive definitions of criminal offenses committed within Indian Country as to all defendants regardless of race.

Congress would not be deprived of the right to legislate when the state definitions for offenses committed within Indian Country were applied if the definitions of Federal criminal offenses did not racially discriminate. Further, Congress would be able to

legislate criminal offenses committed within Indian Country where a state law definition did not exist.

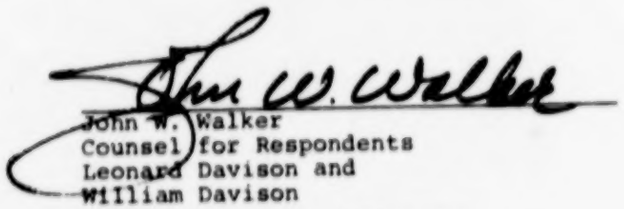
Such a result would not violate the trust responsibility that the Federal Government has toward Indians. Congress, by enacting Public Law 280, gave absolute jurisdiction over criminal offenses committed within Indian Country to six states regardless of whether an Indian was involved as a perpetrator or victim. Thus by enacting P.L. 280 it was recognized that by submitting criminal jurisdiction to states for offenses committed within Indian Country and allowing the states to define the substantive crimes, Congress was not ignoring its trust responsibilities. That is, the Federal Government's wardship or trust responsibility toward Indians is not necessarily furthered by requiring that criminal offenses committed within Indian reservations in which Indians are involved as either perpetrators or victims be necessarily a matter for Federal court jurisdiction.

Were the Court to adopt Respondents' suggested construction, crimes committed on Indian reservations would not go unpunished. All people regardless of race would be judged on the same standard as the constitution requires.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals be affirmed. If the Court reverses the court of appeals it is requested that as to respondent William Davison this case be remanded for determination of two unrelated pending issues now before the court of appeals.

Respectfully submitted,



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